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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,
v.
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KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,
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On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF QUEEN LILIUOKALANI TRUST, KING LUNALILO TRUST, ALU LIKE, INC. AND ASSOCIATION OF HAWAIIAN CIVIC CLUBS IN SUPPORT OF APPELLEES FRANK E. MIDKIFF ET AL.

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI	2
STATEMENT OF THE CASE	4
I. THE KAMEHAMEHA SCHOOLS/BISHOP ESTATE OCCUPIES A UNIQUE POSITION IN HAWAII AND, PARTICULARLY, IN THE HAWAIIAN COMMUNITY	4
A. The nature and purpose of the Trust, its assets and the caliber of its Trustees have combined to establish the Trust as one of the principal leaders in and protectors of the Hawaiian community	4
B. The work of the Trust is of great value to the Hawaiian community, and to the State as a whole. It deserves and is entitled to be preserved and encouraged	6
II. BETTERMENT OF THE STATUS OF INDIVIDUAL HAWAIIANS, AND IMPROVEMENT OF THE HAWAIIAN COMMUNITY IN GENERAL, DEPENDS UPON PRESERVATION OF HAWAIIAN CULTURE, WHICH IS INTIMATELY TIED TO THE LAND	8
A. Land has special value to Hawaiians. Detachment from it has resulted in disproportionately poor social statistics in the Hawaiian community	8
B. The combination of special educational needs of the beneficiaries of this Trust and the cultural values of those beneficiaries require that the statute's assault on the landholdings of the Trust be repulsed	11
SUMMARY OF ARGUMENT	13

TABLE OF CONTENTS—Continued

Page

ARGUMENT 14

I. WHILE THE CONSTITUTION REQUIRES LEGISLATION, AND PARTICULARLY LEGISLATION AUTHORIZING CONDEMNATION, TO BE PREDOMINANTLY FOR PUBLIC BENEFIT AND ONLY INCIDENTALLY FOR PRIVATE BENEFIT, THIS STATUTE IS VICE VERSA 14

A. The current use of the land benefits a wide segment of the public 14

B. In contrast to the benefit to the public now accruing from the leasehold system, use of the residential lots by the persons who cause them to be condemned will be for purely private purposes 15

C. Only the rich, not the poor, will be served by this statute 17

II. THE STATUTE IS IRRATIONAL, INDISCRIMINATE IN ITS IMPACT, AND NEITHER DESIGNED TO NOR CAPABLE OF EFFECTING THE RESULTS DESIRED BY THE LEGISLATURE 19

A. The statute cannot and will not affect the "concentration of land ownership in the State in the hands of a few" 19

B. The statute cannot and will not favorably affect residential land prices 20

III. THERE ARE RATIONAL, LESS DRASTIC WAYS TO SOLVE PRICE AND CONCENTRATION PROBLEMS, WHERE THE RESULTS CAN BE PREDICTED AND CONTROLLED 22

TABLE OF CONTENTS—Continued

Page

A. Forced sales to lessees who wish to purchase deprive the Trust of the full value of the land 22

B. The statute provides a process akin to the remedy of divestiture, but ignores judicially recognized limitations on the use of that remedy 23

C. Means of increasing the supply of residential land and reducing the cost of that land to purchasers are readily at hand 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: Page

Almota Farmers E. & W. Co. v. United States, 409 U.S. 470 (1973) 23
Dohany v. Rogers, 281 U.S. 362 (1930) 23
HHA v. Rodrigues, 43 Haw. 195 (1959) 23
In the Matter of the Estate of His Late Majesty Lunalilo, 4 Haw. 381 (1881) 3, 17
Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) 2
Sharp v. United States, 191 U.S. 341 (1903) 23
State v. Davis, 53 Haw. 582, 499 P.2d 663 (1972) .. 23
State v. Pioneer Mill Co., 64 Haw. 168, 637 P.2d 1131 (1981) 23
Territory of Haw. v. Liliuokalani, 14 Haw. 88 (1902) 9
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 24
United States v. Bodcaw Co., 440 U.S. 202 (1979) .. 23
United States v. Cors, 337 U.S. 325 (1949) 22
United States v. Estate of Bernice Pauahi Bishop, 1 U.S. Dist.Ct. Haw. 179 (1901) 22
United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) 22
United States v. Grinnel Corp., 384 U.S. 563 (1966) 24
United States v. International Harvester Co., 274 U.S. 693 (1927) 24
United States v. Miller, 317 U.S. 369 (1943) 22, 23
United States v. Reynolds, 397 U.S. 14 (1970) 23

Statutes:

H.R.S. § 171-45 25
H.R.S. §§ 171-70 through 171-84 25
H.R.S. Chapter 205 25
H.R.S. Chapter 205A 25
H.R.S. Chapter 206 25
H.R.S. Chapter 359 18
H.R.S. § 359G-4.1 25
H.R.S. § 359-1 18
H.R.S. § 359-31 ..... 18, 19

TABLE OF AUTHORITIES—Continued

	Page
H.R.S. § 516-1(5)	16
H.R.S. § 516-1(11)	15
H.R.S. § 516-22	15, 16
H.R.S. § 516-33(2)	16
H.R.S. § 516-33(3)	16
H.R.S. § 516-33(7)	16
H.R.S. § 516-83(a)(1)	19
20 U.S.C. § 1221-1	8
29 U.S.C. § 1503	14
29 U.S.C. § 1503(11)	2
42 U.S.C. § 1996	14
42 U.S.C. § 2991a	4, 14
42 U.S.C. § 4577(c)(4)	14
48 U.S.C. § 208	12
48 U.S.C. § 691	12
48 U.S.C. § 702(2)	12

Acts:

Act of October 3, 1980, Pub. L. No. 96-374, 94 Stat. 1499	8
Hawaiian Homes Commission Act, c. 42, 42 Stat. 108 (1920)	12, 14
Job Training Partnership Act, Pub. L. 97-300, § 4, 96 Stat. 1325 (1982)	2
Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 (1980)	4

Texts and Articles:

R. Kuykendall, *The Hawaiian Kingdom*, Volume I (1938)	9
Lopez-Reys, *The Demise of the Hawaiian Kingdom*, 18 Haw. B.J. 3 (1983)	10
Department of Geography, University of Hawaii, *Atlas of Hawaii* (2d ed., 1983)	12, 19
Cook, *Research, Program Development, and the Education of Native Hawaiians*, Am. Psych. (1983)	15
Pekkanen, *The Land, Who Owns America?* Town and Country, May 1983	17

Constitutional Provisions: Page

Haw. Const. art. XI, § 10 24

Miscellaneous:

Federal-State Task Force on the Hawaiian Homes Commission Act, *Report to U.S. Secretary of the Interior and Governor of Hawaii* (1983) 14

National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform,* (1983) 14

Native Hawaiians Study Commission, *Report on the Culture, Needs and Concerns of Native Hawaiians* (1983) 8, 9, 10, 11

Native Hawaiian Educational Assessment Project, *Report to the U.S. Secretary of Education* (1983) 8, 10, 11

129 Cong. Rec. S17205 (daily ed. December 14, 1983) 15

State of Hawaii Data Book (1982) 21

U.S. Department of Commerce, Bureau of Census, *Census of Population and Housing* (1980) 17, 18

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INTEREST OF AMICI[1]

The amici are human service organizations in the State of Hawaii who work to meet the unique needs of Hawaiians.[2] They believe the challenged statute, and particularly its application to the lands of appellees, Trustees of Kamehameha Schools/Bishop Estate, affect adversely the interests and welfare of their clients and beneficiaries.

The *Queen Liliuokalani Trust* was established by Queen Liliuokalani[3] in 1909 as a perpetual charitable trust exclusively "for the benefit of orphan and other destitute children . . . in the Hawaiian Islands. The preference to be given to Hawaiian children of pure or part aboriginal blood." The trust maintains six children's service centers on the Islands of Oahu, Molokai and Hawaii to carry out its child welfare activities. Those activities include individual and family services to the children, group services (including an alternative school for alienated youth) and community development services to assist parents and others in self-help action. In 1980 the trust provided service to nearly 5,000 beneficiaries with a budget exceeding 2.6 million dollars.[4]

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[1] Appellants and appellees have consented to the filing of this *amici curiae* brief. The letters of consent have been filed with the Clerk of this Court.

[2] In this brief, the term "Hawaiian" has the same meaning as "Hawaiian native," defined by Congress in the Job Training Partnership Act, Pub. L. 97-300, § 4, 96 Stat. 1325 (1982) as "any individual any of whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii" 29 U.S.C. § 1503(11). The term "Hawaiian community" means all of the Hawaiians, collectively.

[3] Liliuokalani abdicated under pressure in January 1893. Her suit to recover the value of the Crown Lands, which passed to the United States with the annexation of the Islands, was unsuccessful. *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

[4] A small portion of the trust's income is derived from lease rentals of residential lots in a 42-acre tract which could be taken from the trust by the lessees under the provisions of the challenged statute.

The *King Lunalilo Trust* was established in 1874 by the Will of King Lunalilo. Under his Will, as interpreted by the Supreme Court of the Hawaiian monarchy, the King's entire estate was directed to be sold[5] and the proceeds devoted to the operation and maintenance of a home for "poor, destitute and infirm people of Hawaiian (aboriginal) blood or extraction, giving preference to old people." The Lunalilo Home is a custodial care facility accommodating about 50 Hawaiian men and women on an annual budget of about 0.5 million dollars.

Alu Like, Inc. is a private nonprofit corporation whose primary mission is assisting native Hawaiians to develop economic and social self sufficiency. The name means "striving (working) together." The corporation is funded through grants from the U.S. Departments of Health and Human Services and of Labor, State of Hawaii matching funds, and donations by private foundations and individuals. It accomplishes its work through social service centers on the five principal Islands of Hawaii, through an employment and training program and through an economic development institute actively involving Hawaiians in the business and financial communities. Its programs and projects provide direct assistance to nearly 22,000 persons annually with a budget of nearly 5.8 million dollars.[6]

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[5] *In the Matter of the Estate of His Late Majesty Lunalilo*, 4 Haw. 381 (1881). The King had very extensive lands, many of which are now in fully developed residential and business communities and are today worth hundreds of millions of dollars. For a half-century, public funds were required to operate the Home. In the early 1970's, the trust developed 13 acres of the 15-acre Home site. Since then, rent from the 80 new leasehold residential lots has replaced public funds. A condemnation suit against many of those lots, filed by appellant HHA in 1980, has been settled and the trust must convey the lots to lessees desiring to purchase them.

[6] Further information concerning the Queen Liliuokalani Trust, the King Lunalilo Trust and Alu Like, Inc. is in Native Hawaiians Study Commission, *Report on the Culture, Needs and Concerns of*

The *Association of Hawaiian Civic Clubs* is an unincorporated federation of 43 clubs in Hawaii and California. The purpose of the Association is to promote the civic, economic, social, health and moral welfare of individual Hawaiians and the Hawaiian community. The Association has a membership of more than three thousand. Its motto is the same as the motto of the State of Hawaii. In its English translation, this is: "The Life of the Land is Preserved in Righteousness."

STATEMENT OF THE CASE

These amici curiae accept the statement of the case presented by Frank E. Midkiff, et al., appellees. However, these amici also invite the Court's attention to the following additional facts, believed to be relevant to the Court's consideration of the constitutional issues raised on this appeal.

I. THE KAMEHAMEHA SCHOOLS/BISHOP ESTATE OCCUPIES A UNIQUE POSITION IN HAWAII AND, PARTICULARLY, IN THE HAWAIIAN COMMUNITY.

A. The nature and purpose of the Trust, its assets and the caliber of its Trustees have combined to establish the Trust as one of the principal leaders in and protectors of the Hawaiian community.

1984 is the centennial of the probate of the Will of Bernice Pauahi Bishop, which established the Trust that now provides direct service to more than 35,000 Hawaiians annually. The Will directed her five Trustees, and their successors, to establish and maintain schools for boys and girls and to provide care for orphaned children,

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Native Hawaiians, Vol. 1, pp. 445-447 (1983). The Report was mandated by the Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 et seq. (1980) (codified at 42 U.S.C. § 2991a). For convenience, this Report is hereafter referred to as "Study Commission."

giving preference to those of aboriginal blood. The first of the Schools was established in 1887 and the other in 1894. Until the economy of Hawaii expanded, following statehood in 1959, the Trust's income was so limited that its educational work for and in the Hawaiian community was carried on only at the Schools. However, as previously unproductive lands of the Trust were developed in urban usage and the Trust's income substantially increased, the Trustees expanded the Trust's educational role into the community and into the public schools where the majority of Hawaiian students are educated. Particularly in the past dozen years, the Trust has achieved a high degree of visibility in the State through these activities. It is generally known that the Trust is the largest private landowner in Hawaii and that its assets are dedicated to the educational mission of the Trust. It is not as generally known that more than 97% of the Trust lands has been classified by the State Land Use Commission as conservation or agriculture lands, that those lands produce little revenue and that the Trust's sizeable annual income is mostly generated from that small portion of its lands (less than 3%) classified as urban. These latter include the residential subdivisions at which the statute here in issue is aimed, as well as resort and other commercial properties. In all events, the annual budget of the Trust far exceeds that of any other entity (except government) working with the Hawaiian Community. This fact, and recognition that the Trust is a perpetual trust, identify the Trust as the strongest advocate of the interests of the Hawaiian community.

The manner of selection of the Trustees of the Trust, and the responsibilities entrusted to them, assure that they will be persons of high caliber. The five initial Trustees appointed by Mrs. Bishop were four prominent, successful, professional and business men and a widely known and respected clergyman. By direction in her Will, successors to these five have been appointed by a

majority of the Justices of the Hawaii Supreme Court, who have exercised their discretion with care, selecting persons who were established leaders in the community. It would be natural to expect that a well endowed trust whose mission is to serve the Hawaiian community, that is governed by persons who are themselves community leaders, would be looked upon as the leader for the Hawaiian community and that, indeed, is the fact.

B. The work of the Trust is of great value to the Hawaiian community, and to the State as a whole. It deserves and is entitled to be preserved and encouraged.

The Trustees have adopted a broad mission statement committing the Trust to offer maximum meaningful educational opportunities to develop the full potential of Hawaiian youth. The major goal of the long-range plan formulated to carry out that mission is to bring Hawaiian students out of their substandard levels and up to par with students nationwide in levels of educational achievement. The plan relates not merely to the 2,850 full-time students annually enrolled in the primary and secondary school programs at the Kamehameha Schools' campus, but also to the more than 33,000 Hawaiian students in public schools. Strengthening of the public school system is essential to accomplishment of the mission of the Trust, so nearly half of the Trust's annual education budget already is devoted to programs for public schools. These include, for example, an early education reading and comprehension program conducted in the public primary schools in cooperation with the State Department of Education. That program was researched, developed, tested and perfected by the Kamehameha Education Research Institute, created and funded by the Trust, which employs educators, psychologists and other professionals in research and development of education methods and programs best suited to bring Hawaiian students up to national norms.

In addition to classroom programs for full-time students, the Trust, through its Extension Education Division, annually serves thousands of others in the Hawaiian community, ranging in age from preschoolers to senior citizens. These programs cover a wide spectrum. They include evening adult education classes; lectures on Hawaiian culture, crafts, history and other subjects; courses for expectant mothers and for those with very young children; and summer "live-in" programs on campus with teaching designed to enrich the standard curriculum. These additional programs even include direct financial aid to students (not limited to graduates of the Kamehameha Schools) for post high school, college, vocational and other education.

The Trustees annually account to the Circuit Court of the First Circuit of the State of Hawaii. The accounts are reviewed by both a court-appointed Master and the State's Attorney General, each of whom reports in writing his recommendations to the Court concerning the accounts. It has never been suggested that the Trustees' development and leasing of residential lots, their sale of some of them and their insistence on retention of the majority of them was wrong or not in the best financial interests of the Trust. The Trustees' management of the real estate of the Trust is consistent with the mission of the Trust and is appropriate to the preservation of culture and values in the Hawaiian community, as more fully appears hereinbelow. The Trust is the leader in that community and, perhaps, by reason of that leadership has also become a target. The greed of persons who seek to dismember its land ownership to satisfy their personal desires should not be allowed to prevail over considerations demanding that land be retained and continue to be devoted to the education and support purposes of the Trust.

II. BETTERMENT OF THE STATUS OF INDIVIDUAL HAWAIIANS, AND IMPROVEMENT OF THE HAWAIIAN COMMUNITY IN GENERAL, DEPENDS UPON PRESERVATION OF HAWAIIAN CULTURE, WHICH IS INTIMATELY TIED TO THE LAND.

A. Land has special value to Hawaiians. Detachment from it has resulted in disproportionately poor social statistics in the Hawaiian community.

To Westerners, the importance of land lies primarily in its economic value and in the access it provides to political and economic power. To Hawaiians, land is important for entirely different reasons, derived from traditional Hawaiian culture. Land provided the physical connection between them and their gods, formed the basis for their relationships with their rulers and governed their kinship with their environment.

> Hawaiians, through traditions which have not yet totally disappeared, extend their ties with the natural environment to the supernatural in their own special manner. The sea, the beach, the mountains —the total environment—are linked importantly to the lives of the people.[7]

Land was looked upon not as belonging to any individual, but to the gods. All who lived upon and used it, including the rulers, merely administered the land for the benefit of the gods and the community as a whole.

> It is important to emphasize that the concept of fee-simple ownership of the land was unknown to Hawaiians. The high chiefs did not own the land—they merely managed the land and other resources: "From a religious viewpoint, the ali'i nui [high

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[7] Native Hawaiian Educational Assessment Project, *Report to the U.S. Secretary of Education*, p. 99 (1983). This Report (hereinafter, for convenience, cited as "Educational Assessment") was mandated by the Act of October 3, 1980, Pub. L. No. 96-374, 94 Stat. 1499, in which "the Congress declare(d) its commitment to assist in providing the educational services and opportunities which Native Hawaiians need" 20 U.S.C. § 1221-1, note.

> chief] was a person of divine power. Yet his authority was not a personal authority. It was, instead, a power channeled through him by the gods. In relation to the land and natural resources, he was analogous to a trustee." [8]

These special relationships to their environment and to land are also demonstrated by the fact that all of the high chiefs traced their genealogy back to the same beginning pair: Wakea, which is the cosmos, in the sense of the observable heavens and anything lying beyond, and Papa, the terra firma, or solid land.

In the mid-nineteenth century, fewer than 50 years after western merchantmen and whalers (and later, missionaries) began regularly to arrive and remain to do business in Hawaii, King Kamehameha III, his 251 chiefs who were stewards of the land for the lesser chiefs and people, his Privy Council and the Legislature of the Hawaiian Kingdom converted the ancient land tenure system into an Anglo-Saxon, fee-simple regime which did away with the reciprocal rights, privileges, duties and responsibilities among King, chiefs, lesser chiefs and commoners. In the physical division of the real estate, the "undivided interests" of all in the whole of the land were converted by vesting the entire "bundle of rights" recognized by the common law in the new "owners" of particular tracts. This entire process took a scant nine years, from mid-1846 through early 1855.[9] At its conclusion, the government owned 1.5 million acres, the King owned 1 million acres and the remaining 1.5 million acres were owned by the chiefs, all subject to the rights of the people.[10]

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[8] Study Commission, p. 253.

[9] For a description of the process, see R. Kuykendall, *The Hawaiian Kingdom*, Volume I, pp. 269-298 (1938).

[10] That is, reserving the house lots, taro patches and gardens of natives lying within the boundaries of the lands awarded to the government, King and chiefs. *Territory of Haw. v. Liliuokalani*, 14 Haw. 88 (1902).

Through their lack of understanding of the new land system, and their cultural propensities to share and to be more concerned with pleasures of the present than with the fears of the future, the Hawaiians soon became materially, as well as spiritually, separated from their land. The 1890 Census disclosed:

> Of a population of near 90,000, fewer than 5,000 owned land. The relatively small number of Americans and Europeans owned over one million acres. Although three out of four landowners were native Hawaiian, three out of four acres belonging to private owners were held by westerners.[11]

It would be both oversimplification and overstatement to assert that loss of their land, with which Hawiians so closely identified, was the sole cause of the decline of the socio-economic status of Hawaiians in their own homeland.[12] On the other hand, there can be no more doubt that the loss of their land was a strong contributing cause than there can be that Hawiians are, indeed, disproportionately represented in many negative social statistics. Compared with other ethnic groups, Hawaiians have greater percentages unemployed, in lower income groups, on public welfare, arrested for crimes,[13] prosecuted, incarcerated and on probation, bearing illegitimate children, abusing drugs and alcohol and dying short of normal life expectancy.[14] It also has been documented that Hawaiians have lower educational achievement, are over-represented among those qualifying for special education (learning disabled, mentally retarded educable,

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[11] Study Commission, p. 257.

[12] Cf. generally, Lopez-Reyes, *The Demise of the Hawaiian Kingdom*, 18 Haw. B.J. 3 (1983).

[13] "The picture for native Hawaiian juveniles arrested is even more striking. Native Hawaiian juveniles comprised the largest per cent of those arrested for each crime examined." Study Commission, p. 12.

[14] Study Commission, p. 12 and Educational Assessment, p. 24.

handicapped, and so forth) and are disproportionately absent from school.[15]

B. The combination of special educational needs of the beneficiaries of this Trust and the cultural values of those beneficiaries require that the statute's assault on the landholdings of the Trust be repulsed.

The Educational Assessment[16] determined that so much of the Hawaiian culture as still exists has distinctive features which are important to the success or failure of students who are taught in the predominantly non-Hawaiian "culture of classrooms." It documented the fact that Hawaiian students have educational needs which are indeed related to their unique cultural situation. They have a different learning style that emphasizes a preference for actual experience, with peer orientation and affiliation; they tend to have a low self-image and are expected to achieve under a curriculum which is not culturally relevant to them.[17] On the other hand, the Educational Assessment also determined that renewed community interest in things Hawaiian seems to be developing a new sense of pride among Hawaiian students.[18]

Mrs. Bishop executed her Will and Codicils in 1883 and 1884. By that time, the new land tenure system had been in place for more than 30 years and the alienation of the Hawaiians from the land was well under way. Also well under way were the decimation of the Hawaiian population,[19] and the degeneration of the social and economic status of the Hawiians. That Mrs. Bishop ob-

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[15] Educational Assessment, p. vii.

[16] See note 7, *supra*.

[17] Educational Assessment, pp. vii and viii.

[18] Educational Assessment, p. viii.

[19] See Study Commission, pp. 38-40.

served the deterioration of her people, and was determined to reverse that process, is attested by the fact that, with the exception of minor bequests and devises, she left her entire estate in a perpetual trust for the education of children and care of orphans. Nearly four decades before enactment by the United States Congress of the Hawaiian Homes Commisison Act, which had as its purpose the rehabilitation of Native Hawaiians by returning them to the land under 99 year leases at rentals of $1.00 a year,[20] Mrs. Bishop recognized that her people were threatened with ultimate extinction and provided for the institution which now serves as their primary private protector. The lands of the Trust are an aggregation of inherited lands that formerly were owned by her chiefly parents, and her royal cousins, King Kamehameha V and Princess Ruth Keelikolani. Both by reason of the size of her estate and the fact that it is composed of lands formerly held by the ali'i (chiefs and royalty) and, of course, because of the purposes of the Trust, this is the last aggregation of land with which the Hawaiian community can identify and from which it can draw cultural sustenance. It stands, not in replacement, but at least as a symbol of the totality of the land to which they related in their early culture. Not only is the targeted[21] land required to be preserved for the cultural benefit of the Hawaiian community, it is also essential to continuation of the educational programs of the Trust. Only about 15% of the costs of those programs is recovered through tuition and fees.

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[20] Hawaiian Homes Commission Act, c. 42, 42 Stat. 108 (1920); *id.* § 208(2).

[21] None of the other owners of close to or more than 100,000 acres in Hawaii is engaged in significant, if any, single-family residential leasing. Also, of all other owners of 5,000 acres or more, only 7 have or did have any significant numbers of single-family residential leaseholds. These large owners are listed in Department of Geography, University of Hawaii, *Atlas of Hawaii*, p. 153 153 (2d ed. 1983).

The remainder is funded by the Trust, principally by land rent revenues from fewer than 9,000 acres of its lands in the urban classification.

SUMMARY OF ARGUMENT

This statute will operate only for the benefit of those lessees who choose to take advantage of its provisions. For the most part, they are relatively affluent people and, indeed, must be affluent in order to qualify to purchase the land the statute authorizes to be transferred to them. Upon and after transfer, the land will be used entirely for their personal purposes, whether as residences or for investment, sale or rental. In contrast, that land is now used by the Trust as the source of funding for educational and support programs which benefit the entire community. The statute effects takings for purely private use and in the process destroys the public benefit accruing from the current employment of these lands.

The statute is aimed solely at already improved residential land, irrespective of the sizes of the holdings of the owners of that land, and can affect but a small fraction of the privately held land in the State of Hawaii. Despite the declarations of the legislature, the statute will not and cannot have the intended effect upon the two principal problems the legislature claimed to be addressing, those of concentration of ownership and high price of residential housing.

If the legislature truly wished to solve the alleged problems of concentration of ownership and high cost, utilization of already existing statutes could bring about the desired results. Use by the legislature of procedures equivalent to the antitrust remedy of divestiture in a manner never countenanced by any court, and deprivation of the landowners' full measure of compensation for the land taken, both demonstrate that the real purpose of the statute was to enable title transfers to those lessees who wish to buy, without regard to the harm wreaked upon the landowners forced to sell.

ARGUMENT

I. WHILE THE CONSTITUTION REQUIRES LEGISLATION, AND PARTICULARLY LEGISLATION AUTHORIZING CONDEMNATION, TO BE PREDOMINANTLY FOR PUBLIC BENEFIT AND ONLY INCIDENTALLY FOR PRIVATE BENEFIT, THIS STATUTE IS VICE VERSA.

A. The current use of the land benefits a wide segment of the public.

As already noted, the educational and support activities of the Trust are funded almost entirely by the Trust, principally from land rents.[22] As also noted, the major goal of the Trust is to bring Hawaiian students up to par with national norms. The activity of the Trust devoted to attainment of that goal has important beneficial impact on the Hawaii public school system and significant implications for education systems nationally.

The deplorable condition of the educational systems of the nation as a whole, the widespread functional illiteracy that has resulted from a progressive deterioration of those systems, and the alarming implications of these facts have been detailed in several recent nation-wide studies. See, *e.g.*, Report of the National Commission on Excellence in Education, A Nation At Risk: The Imperative For Educational Reform (1983). In striving

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[22] Most of the people directly served by the educational activities of the Trust are in the Hawaiian community. The special needs of that community have been recognized by the United States Congress and Executive Departments for many years. The earliest recognition was the Hawaiian Homes Commission Act. Note 20, *supra*. The most recent have been the reports of the Study Commission, the Educational Assessment and Federal-State Task Force on the Hawaiian Homes Commission Act, Report to U.S. Secretary of the Interior and Governor of Hawaii (1983). Congress has often made specific provisions for "Native Hawaiians," "Native American Pacific Islanders" and "Hawaiian Natives," intending to meet their particular needs. See 29 U.S.C. § 1503; 42 U.S.C. § 1996; 42 U.S.C. § 2991a; and 42 U.S.C. § 4577(c)(4).

to attain its own goal, the Trust is improving education in Hawaii through programs on the campus of the Kamehameha Schools, through programs in the public schools,[23] through Extension Education Division programs and through research. That the Trust is an exemplary institution in the effort to rescue the nation's endangered educational system has recently been recognized by Senator Stafford, the Chairman of the United States Senate Education Subcommittee, who stated he:

> . . . would be most pleased if during this decade we were able to use Kamehameha Schools as a prime example of what our nation's private elementary and secondary schools have the potential for becoming; that is, a true living laboratory combining practical expertise with ongoing quality research endeavors.[24]

B. In contrast to the benefit to the public now accruing from the leasehold system, use of the residential lots by the persons who cause them to be condemned will be for purely private purposes.

The land authorized to be taken by the statute is parcels two acres or less in size "which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as the principal place of residence for a single family."[25] Condemnation proceedings can be commenced when a specified number of lessees,[26] each of whom is required to be the "owner of a residential structure" on the

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[23] Some insight into the background of the Trust's involvement with the public schools in Hawaii, their current relationship and the past and hoped for future participation of the Congress and federal agencies in that relationship, can be gained from Cook, *Research, Program Development, and the Education of Native Hawaiians*, Am. Psych., p. 1015 (1983).

[24] 129 Cong. Rec. S17205 (daily ed. December 14, 1983).

[25] H.R.S. § 516-1(11).

[26] H.R.S. § 516-22.

leased lot,[27] have applied to purchase[28] the lots. These provisions make it apparent that the statute contemplates purely private single-family residential use by the person who applies and pays the money to fund the condemnation. The aim of the statute, obviously, is to transfer the title to the land from the lessor to the lessee. Despite the rhetoric of the legislature, the use of the land will be purely private with the benefits of ownership accruing solely to the new owner for whom the State acted in acquiring the title.

It should also be noted that the statute nakedly invites speculators to take advantage of the acquisition process. The statute contains no requirement that the owner of the dwelling, who purchases the land, must himself reside in the house either before or after the purchase. He must merely be a resident of the State or have a bona fide intent to reside in the tract and, if the latter, not even upon the subject lot.[29] Nor does the statute contain any restriction upon the period of time which the new owner must retain title to the land or the house, any limitation upon the amount of rent he can charge to tenants (unless he chooses to lease it for a period exceeding 20 years[30]) or any restriction on the amount of other real estate the purchasing lessee may own, including single-family leasehold residential property, so long as that other real estate does not include any "fee simple lands suitable for residential purposes within the County."[31] A parent with grown children, or any other group of investors, can purchase as many lots as they have investors in the group, irrespective of other real estate they may own (with the single exception noted), and thereafter sell or rent the

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[27] H.R.S. § 516-33(3).

[28] H.R.S. § 516-22.

[29] H.R.S. § 516-33(2).

[30] H.R.S. § 516-1(5).

[31] H.R.S. § 516-33(7).

property for whatever the market will bear, irrespective of the effect the amounts charged will have on land values. Certainly the investors will derive profit from this course of conduct, but how is the public interest served at all; except adversely?

The ultimate result of alienation of the Trust's land that the statute fosters may be found in sad examples of extensive sales of native lands in Hawaii and Oklahoma. Following sales of its lands, the King Lunalilo Trust was forced to rely on the public dole to support its Home residents.[32] In Oklahoma, most of the Osage Indians sold land granted to them so that few now enjoy the wealth derived from the underlying oil field.[33]

Compare the situation of the Agua Caliente Indians of Southern California, who long ago wisely decided to enter into long-term leases with hotels and others, rather than sell, their tribal lands, fortuitously located in Palm Springs, California. Today, as a result, the Tribe enjoys prosperity unmatched by any other Native American Indian Tribe.[34]

C. Only the rich, not the poor, will be served by this statute.

The majority of the Trust's lots impacted by this statute are in eastern suburban Honolulu.[35] The arithmetical average of the median household income in the census tracts in that geographical area, as revealed by the 1980 Census, exceeds $42,000.[36] None of those census tracts

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[32] See note 5, *supra*.

[33] Pekkanen, *The Land, Who Owns America?*, Town and Country, May, 1983, p. 181.

[34] *Id.*

[35] In census tracts 1.02, 1.03, 1.04, 1.05, 4.01, 4.02, 5, 6 and 9.01.

[36] U.S. Department of Commerce, Bureau of the Census, *Census of Population and Housing*, 1980 Table P-11, PHC 80-2-183.

had more than 3.4% of families within the tract classified below poverty level and none had more than 6.6% of persons classified within 100% to 124% of poverty level. By contrast, the high percentages of families below poverty level, and of persons at 100% to 124% of poverty level, are in other census tracts and go as high as 75% for families below poverty level and as high as 68.6% for persons at 100% to 124% poverty level, with figures close to 50% for both categories in many of them.[37]

No census figures are available showing the values of single-family residences in the leasehold tracts because census information on value is by housing unit, without identification of the housing unit as single-family or multi-family. However, the high value of these residences is demonstrated by the fact that the mathematical average of the median values of the housing units in the census tracts of the Trust in eastern suburban Honolulu (excluding all values in excess of $200,000) exceeds $180,000, while the median value of all reported housing units in the City and County of Honolulu (with the same exclusion) is slightly less than $119,000.[38]

It is indeed ironic, too, that the Trust should now be penalized through the forced sale of its residential lands for activity that it undertook, among other reasons, to alleviate a dire need for housing. The State Housing Acts of 1947 and 1949[39] both declared the existence of "an acute shortage of housing"[40] making imperative immediate action to meet the emergency. These Acts provided for the construction of State housing projects, among other reasons, because "private enterprise has failed to

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[37] *Id.*

[38] *Id.*, Table H-1, PHC 80-2-183.

[39] H.R.S. Chapter 359, Parts I and II.

[40] H.R.S. §§ 359-1 and 359-31.

construct the large number of housing units necessary to remedy" the problem.[41]

II. THE STATUTE IS IRRATIONAL, INDISCRIMINATE IN ITS IMPACT, AND NEITHER DESIGNED TO NOR CAPABLE OF EFFECTING THE RESULTS DESIRED BY THE LEGISLATURE.

A. The statute cannot and will not affect the "concentration of land ownership in the State in the hands of a few".[42]

At the outset, it must be noted that the State government owns 36.5% of the land in Hawaii and 10.1% is owned by the federal government.[43] Of all of the private landowners owning 5,000 acres or more[44] (that is, 12/100ths of 1% of the land area of Hawaii) only 7 have been or are the owners of development tracts containing the single family residential leaseholds lots at which the statute is aimed. Those development tracts have constituted only a fraction of their landholdings and even the elimination of their ownership in 100% of the lots would not materially affect the size of their landholdings. For example, amicus curiae Queen Liliuokalani Trust, due to the relatively sparse populations of the areas where it owns land suitable for single family lots, has been able to develop only 42 acres as a development tract. That acreage represents only 4/10th of 1% of the aggregate of its landholdings, of which more than 95% are in the agriculture and conservation classifications. For further example, Mrs. Bishop's Trust at one time had slightly more than 3,400 acres devoted to development tracts and that acreage represented only 1% of its total holdings. Residential leaseholds comprise so small a portion of the

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[41] H.R.S. § 359-31.

[42] H.R.S. § 516-83(a)(1).

[43] *Atlas of Hawaii*, p. 152.

[44] *Id.*, p. 153.

totality of privately held land that even complete divestiture of all residential leasehold land would have a negligible effect on the alleged concentration of ownership.

Furthermore, the statute is not limited in its operation to the holdings of large landowners. It operates against all owners of all lots in development tracts. These include small landowners such as amicus curiae King Lunalilo Trust whose aggregate landholdings are 15 acres. It also includes persons who could be the owner of only a single leased lot. Although the statute refers to development tracts, it does not exclude development tracts in which there are multiple owners, some of whom may be the owners and lessors of only a few lots or even a single lot. Examples of such development tracts are Manoa Acres, Kahanahou Circle and Parrish Trust tracts. One lessor in Manoa Acres, against whom the challenged statute would apply, owns only one lot in the tract.

Finally, there is absolutely no government control over application of the statute to the various lands to which it might by its terms be applied, or any means of predicting the location, number and sizes of lots whose ownership might be transferred pursuant to its provisions. An opportunity to purchase is afforded to all lessees in development tracts, but whom among them may wish to purchase, be able to afford to purchase and qualify to purchase cannot be foretold. The targets of the statute are the lessors of those lots, whether their holdings are small or large. The sole purpose to be achieved is the forced transfer of ownership to lessees who wish to buy.

B. The statute cannot and will not favorably affect residential land prices.

Even to those untutored in economics, the effects of supply and demand on prices are well known. This statute, however, pretends that the law of supply and demand does not exist or does not operate in the residential housing market. The statute does not create a single addi-

tional housing unit or even one additional lot on which a housing unit could be built. The number of housing units in the market is absolutely unaffected by the statute. While the number of fee simple owners may be increased by the statute, the numbers of houses and lots will not be.

In any event, the statute concerns itself with only a portion of the residential housing market and makes the unwarranted assumption that increasing the number of owners in that portion of the market will reduce the prices in that portion of the market. This is absurd. The market for residential housing consists of leasehold single-family residences (which this statute addresses); fee simple single-family residences; both fee simple and leasehold townhouses, condominiums and other multi-family housing units; and rental units (none of which this statute addresses). It is the demand in that entire market and the supply in that entire market that determine prices of units in the market. In that market, there were, on the Island of Oahu, in 1982, nearly 257,000 housing units, of which approximately 35,500 were owner-occupied units on leased land.[45] The latter figure includes both units in multi-family buildings (e.g., condominium apartments), to which the statute does not apply, and single-family buildings, to which the statute does apply.[46] The statute, therefore, reaches only a portion of the reported number of owner-occupied residential units on leased land. Even if it be assumed that as many as half of that number are single-family units, they would constitute less than 7% of the housing units in the market. To conclude, as the legislature apparently did, that the transfer of title to an undetermined, and indeterminate, number constituting less than 7% of residential housing

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[45] *State of Hawaii Data Book*, Table 486, at p. 497 (1982).

[46] No figures are published showing the numbers of single-family residential leasehold units and single-family residential fee simple units, much less any showing the numbers of these that are owner-occupied and that are rented.

units, from the current owners to the persons occupying the units, would materially decrease residential land prices or residential housing costs defies reason, and the lessons of common experience. In short, the statute affects neither the supply side nor the demand side of the economic equation and therefore cannot effect the results desired and proclaimed by the legislature.

III. THERE ARE RATIONAL, LESS DRASTIC WAYS TO SOLVE PRICE AND CONCENTRATION PROBLEMS, WHERE THE RESULTS CAN BE PREDICTED AND CONTROLLED.

A. Forced sales to lessees who wish to purchase deprive the Trust of the full value of the land.

Although "just compensation" is to be paid to the trust in the eminent domain proceedings, that compensation will not assure that the Trust receives the full value of its land. The law of compensation in eminent domain is general in its application and is not tailored to particular situations, much less to the application of this unique statute to the land of the Trust. Examples of the adverse impact of that general law, on the land of this Trust, abound.

It is well-settled that value to the owner is not an element to be considered in arriving at just compensation.[47] Therefore, the cultural value of this land and the contribution of that value to the educational mission of the Trust, and to the promotion of the betterment of the Hawaiian community in general, must be ignored in the eminent domain proceedings. It is equally well-settled

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[47] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (values deriving from unique need for or idiosyncratic attachment to property are not compensable); *United States v. Cors*, 337 U.S. 325, 332 (1949) (special value to an owner because of property's adaptability to his needs is not compensable); *United States v. Miller*, 317 U.S. 369, 374-375 (1943) (same); *United States v. Estate of Bernice Pauahi Bishop*, 1 U.S. Dist. Ct. Haw. 179, 189 (1901) (willingness or unwillingness of defendant to part with property is not a proper element of value in condemnation case).

that just compensation does not include the award of fees, expenses and costs in recovering that compensation.[48] Furthermore, the compensation to be paid is the fair market value at the date of taking,[49] so nothing is paid for the value increment arising from reasonably expected long-term appreciation in the land value. Nor, when entire individual lots are taken, can there be any recovery of the loss in value of other lots in the tract, or damages for increase in costs of administrative with respect to those lots, because this is not the kind of severance recognized by the law of condemnation as compensable.[50]

In short, the seller is deprived of all of the advantages of a negotiated sale that permit him to obtain the highest price, or advantage, from the sale of the property. These include the opportunity to replace the land taken with other land to be exchanged for it, and the value obtainable through adjustments in the time of sale, the number of parcels in the sale, the locations of those parcels, the terms of payment and so forth. Here, instead, the seller is required to sell the lot identified, at the time specified, for cash, and without regard to the effect of that sale upon the seller's other property.

B. The statute provides a process akin to the remedy of divestiture, but ignores judicially recognized limitations on the use of that remedy.

As a matter of substantive law, a general legislative pronouncement of concentrated ownership is insufficient

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[48] E.g., *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979); *Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *State v. Pioneer Mill Co.*, 64 Haw. 168, 186-187, 637 P.2d 1131, 1143 (1981); *State v. Davis*, 53 Haw. 582, 586-587, 499 P.2d 663, 667 (1972).

[49] *Almota Farmers E. & W. Co. v. United States*, 409 U.S. 470, 474 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *HHA v. Rodrigues*, 43 Haw. 195, 197 (1959).

[50] *Sharp v. United States*, 191 U.S. 341, 353-355 (1903); *United States v. Miller*, 317 U.S. at 376.

to create an anti-trust violation, much less warrant the drastic remedy of divestiture. In a civil anti-trust action, the government is required to carry its burden by a preponderance of evidence and a court may not rely upon *ex parte* administrative findings to order divestiture as it "violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination." *United States v. International Harvester Co.*, 274 U.S. 693, 703 (1927).

Even assuming the alleged concentration can be proved and requires governmental corrective measures, certainly this statute is not a permissible means to that end. The statute provokes indiscriminate divestiture of all residential leasehold lands owned by large and small landowners. No anti-trust decision has required such a drastic remedy. Even in a case involving enormous market control (e.g., in excess of 87%), the drastic remedy of divestiture was used sparingly. *United States v. Grinnel Corp.*, 384 U.S. 563, 578 (1966). Further, this Court warned in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951), that courts must exercise restraint, as divestiture is not to be used "indiscriminately, without regard to the type of violation or whether other effective methods, less harsh are available."

C. Means of increasing the supply of residential land and reducing the cost of that land to purchasers are readily at hand.

The Constitution of Hawaii calls for the use of public lands "for the development of farm and home ownership on as widespread a basis as possible."[51] Statutory authorization, spelling out the means for carrying that mandate into effect, exists in abundance. These laws provide for the subdivision and sale of public lands in fee

[51] Haw. Const. art. XI, § 10.

simple or by long-term leases and for the acquisition of private lands by the State for similar action and disposition.[52]

The State of Hawaii controls the first level of land use regulation [53] and also has the authority to preempt county zoning and land use ordinances.[54] These land use powers can be exercised in such manner as to create the required use classifications to allow residential development and to negate any conflicting ordinances or rules of lesser governmental agencies. Such actions would not only permit and encourage development, but could also substantially reduce the costs of such development, and the ultimate cost to purchasers of the land, by exempting developments from compliance with costly improvement requirements. Further, exemption or relief from property, excise and other taxes could be granted to any one or more of sellers, developers and purchasers. Also, if useful, long-term, low interest loans could be used to encourage development and purchases. No doubt nimble minds could conceive of many additional ways in which government could remove current limitations on supply of residential land and encourage development for residential use of land currently unused or in other uses.

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[52] H.R.S. § 171-45, §§ 171-70 through 171-84 and H.R.S. Chapter 206.

[53] H.R.S. Chapters 205 and 205A.

[54] See, for example, H.R.S. § 359G-4.1.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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